

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-15(1)M  
Estate Tax  
May 29, 2015

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M141121A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] "Petitioner". Petitioner asks whether a membership interest in a single-member LLC (SMLLC), which is disregarded for income tax purposes, is "intangible property" for New York State estate tax purposes.

We conclude that a membership interest in a SMLLC owning New York real property, which is disregarded for income tax purposes, is not treated as "intangible property" for purposes of New York State estate tax purposes. However, where a SMLLC makes an election to be treated as a corporation pursuant to Treasury Regulations § 301.7701-3(c), rather than being treated as a disregarded entity, such ownership interest would be considered intangible property for New York State estate tax purposes.

**Facts**

Petitioner, an individual residing in New York State, is considering forming a SMLLC under Delaware law for the sole purpose of contributing his condominium, located in New York State, to the LLC and then moving to another state. He intends to remain as the sole owner of that LLC for the remainder of his life and to reside outside of New York State until his death. The Petitioner's question presumes that the proposed SMLLC would be disregarded for income tax purposes. As such, this proposed SMLLC would not be treated as a corporation under Treasury Regulations § 301.7701-3(c).

**Analysis**

An estate tax is imposed on the transfer by the estate of a non-resident decedent of real property and tangible personal property where such property is physically located in New York State. *N.Y. Tax Law § 960 (a)*. Condominiums constitute real property and as such are generally subject to New York State estate tax. *Real Property Law § 339-g*. However, where real property, including condominiums, is held by a corporation, partnership or trust, interest in such entity has been held to constitute intangible property. *See Estate of Havemeyer* 17 N.Y.2d 216, (1966) and *In the Matter of Finkelstein*, 40 Misc.2d 910, (Surr. Ct. Rockland County 1963). Similarly, Tax Law § 951-a(c) defines "tangible personal property" to exclude the following items: bank deposits, mortgages, debts receivables, shares of stock, bonds, notes, credits, evidences of an interest in property, evidences of debt, or legal claim generally and as such, those items are deemed intangible property.

The New York State Constitution prohibits the imposition of an estate tax on a nonresident's intangible property, even if such property is located in New York State. (*N.Y.*

*Const. Art. 16*). Moneys, credits, securities and other intangible personal property within the state, that are not used in carrying on any business within the state by the owner, are considered to be located at the domicile of the owner for purposes of taxation. *N.Y. Const. Art. 16 § 3*. NY Tax Law § 960 likewise indicates that a NY taxable estate does not include the value of any intangible personal property otherwise includible in the deceased individual's NY gross estate.

Pursuant to 26 CFR §§ 301.7701-2, an entity that has a single owner is recognized as an entity or can be disregarded. "A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner." 26 C.F.R. § 301.7701-2(a). As such, pursuant to 26 C.F.R. § 301.7701-3(a), an entity with a single owner, such as a SMLLC, is disregarded as an entity separate from its owner unless it elects to be classified as an association and so a qualifying SMLLC can elect to be classified as an association and thus treated as a corporation by making an entity classification election with the IRS. 26 C.F.R. § 301.7701-3(c)(1)(i).

Where no election is filed, the default classification of the SMLLC is that the entity is disregarded and is not deemed to be an entity separate from its owner. 26 C.F.R. § 301.7701-3(b)(ii); 6611, *Ltd. v. C.I.R.*, 2013, 2013 WL 560866 . "An entity whose classification is determined under the default classification retains that classification (regardless of any changes in the members' liability that occurs at any time during the time that the entity's classification is relevant)... until the entity makes an election to change that classification". 26 C.F.R. § 301.7701-3(a).

Based on the above analysis, where a SMLLC is disregarded for Federal income tax purposes, it is treated as owned by the individual owner and the activities of the SMLLC are treated as activities of the owner. Therefore, under the circumstances described by the Petitioner, interest in the SMLLC owned by Petitioner would not be treated for estate tax purposes as an intangible asset. Instead, the condominium held by the SMLLC would be treated as real property held by the Petitioner for New York State estate tax purposes.

DATED: May 29, 2015

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